IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10988 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

SUNIL MAHINDAR SAHU (DETENU) THROUGH COUSIN SISTER GITABEN

Versus

COMMISSIONER OF POLICE SURAT AND OTHERS

==========

Appearance :
MS DR KACHHAVAH for Petitioner,MR KAMLESH KACHHAVAH for Petitioner.
RULE SERVED for Respondent(s) : 1 - 2.
MR ND GOHIL, AGP for Respondent No.3.

==========

CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 14/07/2006

ORAL JUDGMENT

This petition is filed by the cousin sister of the detenu. By filing this petition, the petitioner has challenged the detention order of the detenu dated 9-3-2006, by which the detenu is detained as a

"bootlegger" under Gujarat Prevention of Anti Social Activities Act [hereinafter referred to as PASA Act]. With the detention order, the detenu is also served with the grounds of detention. In the grounds of detention, there is a reference to a solitary case pending against the detenu. The aforesaid case is registered with Umra Police Station, being Gunah Register No.III-119/2006 under the Bombay Prohibition Act. It is alleged that the detenu is dealing in foreign liquor.

Mr.Kachhavah, learned advocate for the petitioner submitted that except a solitary criminal case, there is no other material available for coming to the conclusion that the detenu is a "bootlegger". He further submitted that no statement of any independent witnesses have been recorded by the detaining authority for coming to the conclusion that the activities of the detenu are prejudicial to public order or even tempo of public life is disturbed by his activities. It is submitted that at the most it can be said that the detenu has violated law and order and not public order. In order to substantiate his say, learned advocate for the petitioner has also relied upon the decision of the Supreme Court in District Collector, Ananthapur and another vs. V. Laxmanna reported in 2005 AIR SCW 1822. In the aforesaid case, the Supreme Court has observed as under in paragraphs 7 and 8 :

> "7. We do not think this argument of the learned counsel can be accepted. If the detention is on the ground that the detenu is indulging in manufacture or transport or sale of arrack then that by itself would not become an activity prejudicial to the maintenance of public order because the same can be effectively dealt with under the provisions of the Excise Act but if the arrack sold by the detenu is dangerous to public health then under the Act, it becomes an activity prejudicial to the maintenance of public order, therefore, it becomes necessary for the detaining authority to be satisfied on material available to him that the arrack dealt with by the detenu is an arrack which is dangerous to public

> health to attract the provisions of the Act and if the detaining authority is satisfied that such material exists either in the form of report of the Chemical Examiner or otherwise copy of such material should also be given to the detenu to afford him an opportunity to make an effective representation.
>
> 8. Therefore, while holding that dealing with arrack which is dangerous to public health would become an act prejudicial to the maintenance of public order attracting the provisions of the Act. It must be held that it is obligatory for the detaining authority to provide the material on which it has based its conclusion on this point. Therefore, we are in agreement with the High Court that if the detaining authority is of the opinion that it is necessary to detain a person under the Act to prevent him from indulging in sale of goods dangerous for human consumption the same should be based on some material and the copies of such material should be given to the detenu."

In order to substantiate his say, learned advocate for the petitioner has further relied upon the decision of the Division Bench of this Court rendered in Letters Patent Appeal No 223 of 2000 in Special Civil Application No. 554 of 2000 in the case of Ashok Balabhai Makwana V. State of Gujarat. In paragraph 5 of the said judgement, Division Bench of this Court has held as under :

> "If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or

public health and that tempo of public life was disturbed. No observation made in any part of the judgement can be read in isolation and bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S. Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the mater keeping in view the observations made by the Supreme Court in the case of K.S. Zala v. State of Gujarat

> (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore, cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

Learned advocate further submitted that the detenu was already in judicial custody, when the order of detention was passed against him. Learned advocate for the petitioner further submitted that the detaining authority has not given any reasons as to on what basis and material it has come to the conclusion that the detenu may move an application for bail at any point of time and after being released on bail, he may continue with the same activities. In this connection, learned advocate for the petitioner has relied upon a recent decision of the Honourable Supreme Court in the case of **T.V. SRAVANAN vs. STATE** reported in (2006) 2 SCC 664. In the said judgment, the Honourable Supreme Court has held as under in paragraphs 13 and 14:

> "13. A somewhat similar reasoning was adopted by the detaining authority in Rajesh Gulati v. Govt. of NCT of Delhi. This Court noticing the facts of the case observed: (SCC pp. 133-134, para 13).
>
> ""13. In this case, the detaining authority's satisfaction

> consisted of two parts – one: that the appellant was likely to be released on bail and two: that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of detention was passed. But the detaining authority said that 'bail is normally granted in such cases'. When in fact the five applications filed by the appellant for bail had been rejected by the courts (indicating that this was not a 'normal' case), on what material did the detaining authority conclude that there was 'imminent possibility' that the appellant would come out on bail? The fact that the appellant was subsequently released on bail by the High Court could not have been foretold. As matters in fact stood when the order of detention was passed, the 'normal' rule of release on bail had not been followed by the courts and it could not have been relied on by the detaining authority to be satisfied that the appellant would be released on bail. (See in this context Ramesh Yadav v. District Magistrate, Etah, AIR at p. 316).""

14. We are satisfied that for the same reasons the order of detention cannot be upheld in this case. The bail applications moved by the appellant had been rejected by the courts and there was no material whatsoever to apprehend that he was likely to move a bail application or that there was imminent possibility of the prayer for bail being granted. The 'imminent possibility' of the appellant coming out on bail is merely the ipse dixit of the detaining authority unsupported by any material whatsoever. There was no cogent material before the detaining authority o n the basis of which the detaining authority could be satisfied that the detenu was likely to be released on bail. The inference has to be drawn from the available material on record. In the absence of such material on record the mere ipse dixit of the detaining authority is not sufficient to sustain the order of detention. There was, therefore, not sufficient compliance with the requirements as laid down by this Court. These are the reasons for which while allowing the appeal we directed the release of the appellant by order dated 13.12.2005."

Mr.N.D.Gohil, learned AGP has submitted that it is true that except solitary case, there is no other material against the detenu. Accordingly,

learned AGP is not in a position to substantiate his say that the activities of the detenu are prejudicial to public health.

It is not in dispute that except a solitary criminal cases, there is neither any statement of any witnesses nor any documents on the record to suggest that the activities of the detenu prejudicially affect public health or that by the said activities, the even tempo of public is disturbed. Moreover, there is nothing on the record to suggest as to on what basis the detaining authority has come to a conclusion that the detenu is likely to be granted bail on presentation of the bail application.

Considering the aforesaid aspect of the matter as well as after considering the judgement of the Supreme Court as well as of the Division Bench of this Court and considering the fact that there is nothing to show that the activity of the detenu is prejudicial to public health, at the most it can be said that the detenu is guilty of violating law and order but it cannot be said that the activity of the detenu is prejudicial to public health. Therefore, the impugned order of detention is required to be quashed and set aside.

In view of what is stated herein above, this petition is allowed. Order of detention dated 9-3-2006 is quashed and set aside. Detenu – Sunil Mahindar Sahu is ordered to be released forthwith unless his presence is required in connection with any other case. Rule is made absolute with no order as to costs.

(P.B.MAJMUDAR, J.)

/malek